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THIRD UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES
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Item 8 (a) of the provisional agenda

REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(a) Review of 15 years of application and implementation of the Set

Note by the UNCTAD secretariat

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INTRODUCTION

1. Almost 15 years ago, on 5 December 1980, after having been approved by the United Nations Conference on Restrictive Business Practices, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) was adopted by the General Assembly of the United Nations in resolution 35/63. In 1981, the international institutional machinery provided for in section G of the Set was established, in the form of the Intergovernmental Group of Experts on Restrictive Business Practices, meeting annually. Moreover, subject to the approval of the General Assembly, five years after the adoption of the Set, a United Nations Conference was to be convened by the Secretary-General of the United Nations under the auspices of UNCTAD, for the purpose of reviewing all the aspects of the Set. Towards this end, the Intergovernmental Group of Experts was requested to make proposals to the Conference for the improvement and further development of the Set (section G (iii) - Review Procedure - of the Set).

2. In compliance with this mandate, the General Assembly convened a Review Conference in 1985, and a Second Review Conference in 1990. Following a recommendation at that Conference that a Third Review Conference be held in 1995, the General Assembly, in its resolution 48/442 of 21 December 1993, decided to convene a Third Review Conference.

3. The Intergovernmental Group of Experts, at its fourteenth session (6-10 March 1995), acting as preparatory body for the Third United Nations Conference to Review All Aspects of the Set on Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Third Review Conference), requested the UNCTAD secretariat "to prepare a review and assessment of 15 years of application and implementation of the Set (agreed conclusions, annex I to the report of the fourteenth session, TD/B/42(1)/3-TD/B/RBP/106).

4. Accordingly, in this note the secretariat attempts to review broadly important developments in the field of competition policy since the adoption of the Set in 1980, and to make an assessment of the application and implementation of this multilateral instrument. The concluding section (sect. III) contains suggestions put forward by the secretariat as to possible avenues for further action in the area of competition policy.

I. IMPORTANT DEVELOPMENTS IN THE FIELD OF COMPETITION POLICY SINCE THE ADOPTION OF THE SET IN 1980

5. Since the adoption of the Set in 1980, there have been considerable changes in the world economy, increased reliance being placed on market forces - hence, on competition - to improve efficient allocation of resources. Deregulation of previously protected markets in developed market-economy countries was followed by a wave of market-oriented reforms in most countries, including developing countries and countries in transition. In developed countries, various regulations affecting prices, market entry or exit and monopolies, as well as the ambit of RBP laws have been liberalized or reformed, and large privatization programmes have been implemented, or are in the process of implementation. In many developing countries, structural adjustment programmes have been adopted that include market-oriented reforms,

notably in the areas of deregulation of prices, including the reduction or elimination of subsidies, administrative allocation of key product inputs, privatization of public enterprises and monopolies, as well as liberalization of trade policy and investment regimes. In former centrally-planned economies, far-reaching institutional changes have been accompanied by moves towards market economy systems integrated more closely into the world economy.

6. A common aspiration underlying these reforms has been that the reduction of governments' direct involvement or intervention in economic activity would, by providing enterprises with more freedom and stronger incentives, stimulate entrepreneurial activity, business efficiency, productive investment and economic growth, as well as enhance consumer welfare through improved quantity and quality of goods and services at prices determined by the market rather than by administrative decision. The "free-play" of supply and demand would, in the long run, determine market prices throughout the economy, allowing productive resources to be allocated in an efficient manner. It has been recognized, however, that the benefits of market-oriented reforms are likely to be fully realized only if enterprises act under the spur of competition, so that consumer wishes and opinions are reflected in market performance. A well-functioning market mechanism is essential in this respect; for example, price liberalization in a market dominated by monopolies, unless specific efforts are made to ensure the existence of competition (such as by opening borders to import-competition) will end up in monopolistic price rises without corresponding competitive price-equilibrium.

7. In recognition of the major role of competition for the success of policy reforms, many countries - developed, developing as well as countries in transition - have adopted competition laws and established national competition authorities in recent years. At present, all developed countries have adopted competition legislation. Several developing countries have done or are in the process of doing so, 1/ and countries in transition, 2/ as well as China have also adopted laws dealing with competition, demonopolization and restrictive business practices in general. Many countries which had adopted competition legislation at an earlier stage, have amended or are in the process of reviewing and amending their laws, to bring them more in line with modern concepts. 3/

8. The market-oriented reforms at the national level have also had important repercussions at regional and multilateral levels. Progress in regional groupings such as the creation of the European "single market of 1992" and the further integration of European Community countries and most EFTA members into the European Economic Area (EEA) have had important consequences in the field of competition policy. On the one hand, the European Commission has pledged to open previously regulated sectors of member States to market forces and competition. This process of deregulation, although slow to a certain extent, has still achieved a reasonable degree of success in a number of services such as sea, land and air transport, telecommunications, utilities, and other such areas previously outside the ambit of competition regulations. Moreover, in the run-up to the "single market" of 1992 and further, under the EEA Agreement, several countries which had not done so before, adopted EC-compatible competition legislation. Competition legislation being part of the "achievements of the Community" (acquis communautaire), EEA signatories accepted supranational "Euro-compatible" competition rules in line with

articles 85 and 86 of the Treaty of Rome, for the control of restrictive business practices affecting trade between States members of the EEA. Further, those EEA countries who became members of the European Union in 1995, have adopted EU's competition policy in full.

9. The North American Free Trade Agreement (NAFTA), although not involving supranational control of competition, has adopted as a condition for accession the passing of national competition legislation and the establishment of an effective enforcement agency. This condition has created considerable interest in competition policy and spurred efforts to adopt appropriate legislation by several countries of the region interested in posing their candidature to join NAFTA.

10. The free-trade arrangements between Australia and New Zealand (ANZCERTA) included amendments to the competition laws of each country to cover anticompetitive behaviour in bilateral trade. It was also agreed that courts in the one country may pursue competition cases involving the other country.

11. Broad competition rules were adopted by the Andean Group in 1991, 4/ and discussions on regional competition policy are envisaged in MERCOSUR, with a view to achieving a common regime in this field. Similarly, member States of the Asia Pacific Economic Cooperation (APEC) are discussing competition policy and law issues in the context of the APEC trade facilitation and liberalization agenda.

12. At the multilateral level, the successful conclusion of the Uruguay Round has undoubtedly created a new momentum in favour of worldwide competition. Apart from the fact that the basic rationale behind trade liberalization is the enhancement of international competition, a number of provisions of the Agreements have a direct bearing on competition; for example, the General Agreement on Trade in Services (GATS) contains a number of provisions directly related to competition issues. For example, article VIII provides that, inter alia, monopoly suppliers should not abuse their monopoly power either directly or through an affiliated company, when supplying a service outside the scope of their monopoly rights. This article also applies to cases of exclusive service suppliers, where a State member to GATS authorizes or establishes a small number of service suppliers and substantially prevents competition among them in its territory. A notification procedure is provided for (art. VIII:4) requiring information whenever members grant monopoly rights regarding services covered by their commitment. The Annex on Telecommunications contains specific provisions concerning access to, and the use of, public telecommunications, transport networks and services. Article IX provides that, in case certain restrictive business practices of service suppliers restrain competition, and thereby trade in services, members may undertake to enter into consultations with other member States. The members addressed shall accord full and sympathetic consideration to such a request and cooperate by supplying relevant publicly available non-confidential information, as well as other information (subject to its domestic law and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality).

13. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) recognizes that appropriate measures may be needed to prevent

the abuse of intellectual property rights by right holders or recourse to practices which unreasonably restrain trade or adversely affect the transfer of technology (art. 8). Moreover, in article 40, section 8, on "Control of Anti-competitive Practices in Contractual Licences", members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and impede the transfer of technology. Article 40 provides that nothing in the Agreement shall prevent members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights that have an adverse effect on competition in the relevant market, or from adopting appropriate measures to prevent or control such practices. The Agreement provides for consultations similar to those in GATS article IX, and it establishes, for purpose of dispute settlement, that nothing in the Agreement (subject to the provisions on national treatment and MFN) may be used to address the issue of the exhaustion of intellectual property rights (art. 6).

14. The Agreement on Trade-Related Investment Measures (TRIMs) provides that no later than five years after entry into force of the WTO, the Council for Trade in Goods shall consider whether the TRIMs Agreement needs to be complemented with provisions on investment policy and competition policy (art. 9).

15. In this connection, negotiations have recently been launched in the Organisation for Economic Cooperation and Development (OECD) on a code on international investment. It should be noted that the OECD has an extensive programme of work on competition in its Committee on Competition Law and Policy (CLP), as well as joint meetings of the CLP and the Trade Committee on issues of competition policy affecting trade and trade policy issues affecting competition. In their Joint Report on Competition and Trade Policies of 1993, both Committees agreed that "a comparative analysis of the relevant provisions in international, bilateral, regional and multilateral agreements and instruments should be undertaken". 5/ As a first step, a joint round table was organized in April 1994 to identify competition elements in international agreements. The objective was to focus on common elements found throughout these agreements. As stated in their joint report, "This exercise is ongoing and will continue under the mandate to explore the desirability and feasibility of integrating competition rules into a multilateral framework as requested by the 1993 Ministerial". However, it may be noted in this context that there is an asymmetry in the manner in which the TRIMs Agreement forbids trade-distorting investment measures by governments, while failing to address RBPs by firms having equivalent effects.

16. Insufficient account is also taken in the Uruguay Round Agreements of the interrelationships between RBPs and governmental rules and restrictions. The relationships between government regulation of the distribution sector and exclusionist distribution structures and practices, or the manner in which trade measures facilitate collusion are well known. The trade practices that anti-dumping regimes seek to control are essentially the same as discriminatory pricing. However, compared to the balanced and equitable manner in which RBP control regimes evaluates differences in pricing within

national borders, anti-dumping regimes apply different and more stringent criteria and procedures for the control of such differences when they occur at the cross-border level.

17. Thus, better mechanisms are needed to address not only RBPs affecting international competition and trade, but also to encourage trade regimes to draw upon competition concepts and philosophies to mitigate protectionist or trade-distorting measures by governments - these two approaches should be seen as broadly complementary. For this purpose, there is a need to identify ways whereby trade rules could be modified so as to take more into account competition policy and consumer welfare considerations.

II. ASSESSMENT OF THE APPLICATION AND IMPLEMENTATION OF THE SET

18. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (The Set) was unanimously adopted by the General Assembly in resolution 35/63 of 5 December 1980. Almost 15 years later, after considerable market-oriented reforms in the world economy as described in section I of this note, the Set is still the only fully multilateral instrument on competition policy in existence today.

19. While several calls for post-Uruguay Round negotiations on competition - along with investment - have been made at the Ministerial Meeting in Marrakesh and elsewhere, 6/ the basic principles and rules contained in the Set are still broadly valid today. This was also the position taken by the Second United Nations Conference to Review All Aspects of the Set in 1990, 4/ which reaffirmed the importance of the Set, and decided that its implementation should be strengthened (resolution adopted by the Conference on "Strengthening the implementation of the Set", Annex to TD/RBP/CONF.3/9).

20. To this end, the Conference expressed concern at the continuing existence of RBPs adversely affecting international trade, particularly the trade and development of developing countries, and called upon States "to implement fully all provisions of the Set in order to ensure its effective application" (para. 1 of resolution adopted by the Second Review Conference, Annex to Report of the Conference, document TD/RBP/CONF.3/9). The Second Review Conference further considered that one important means of achieving this goal was the adoption and effective enforcement of national RBP legislation, and to this end made specific suggestions addressed at States which may wish to request information and seek consultations and technical assistance on competition policy.

21. With respect to technical assistance, the Second Review Conference recognized the importance of such cooperation at both bilateral and multilateral levels, and noted "the commitment of States members of Group B to continue to provide technical assistance on both a bilateral and multilateral basis, subject to availability of resources and tailored to the requirements of individual countries or groups of countries". 7/

22. While a serious degree of disappointment was expressed after the First Review Conference in 1985, because calls by developing countries for the Set to become a legally-binding instrument were not met, the results of the Second Review Conference were felt to be much more positive. The pro-competition

developments, especially in the first half of the 1990s, resulting in the adoption of competition policy and legislation by many countries, including developing countries, no doubt contributed to this improved outcome.

The main objectives of the Set (Section A)

23. Objective No.1, namely: "To ensure that RBPs do not impede or negate the realization of the benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries" takes a new dimension after the conclusion of the Uruguay Round. Basically, as trade is liberated from governmental barriers such as tariff and non-tariff measures, the danger exists that in the absence of any control, enterprises, especially the largest dominant firms, might replace governmental barriers by a battery of restrictive business practices aimed at strengthening their dominance and monopolizing markets. It is therefore no surprise that, just before and immediately after the conclusion of the Round powerful demands were voiced to initiate negotiations at WTO to deal with "trade and competition policy, including rules on export financing and restrictive business practices".

24. Objective No. 2, namely: "To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through (a) The creation, encouragement and protection of competition; (b) Control of the concentration of market power; (c) Encouragement of innovation", has received considerable attention, and important progress has been made. As described in the first part of this note, all developed countries and a rapidly growing number of developing countries and countries in transition have adopted similar legislation, or are about to do so, 8/ and encourage and promote actively competition in their own territory. Moreover, most countries having such legislation also control mergers, and those countries which have embarked on transition from central planning to market economy have undertaken far-reaching de-monopolization and privatization programmes.

25. Objective No.3, namely: "To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries" has also received increasing attention. Competition laws in many countries, including developing countries, have been supplemented by consumer protection legislation. In some of these countries, it is the same body which ensures the enforcement of both sets of legislation which, as far as the economic interests of consumers are concerned, are closely related indeed. 9/

26. Objectives 4 and 5, namely: "To eliminate the disadvantages to trade and development which may result from the RBPs of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries" and "To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of RBPs for adoption at the international level and thereby facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels" are perhaps the objectives for which most efforts are needed at this stage. As countries adopt appropriate domestic

competition principles, the need remains for multilateral principles to be universally accepted and implemented. Since the Set is so far the only fully multilaterally agreed instrument on competition, it could well provide the basis for evolving the text of general principles to be integrated into the principles and rules governing the international trading system. The timing therefore seems appropriate for a renewed effort to publicize the Set and for considering whether all or at least some of its provisions could be useful in this endeavour.

Section B - Definition and scope of application

(i) Definitions

27. While the definitions contained in the Set for "restrictive business practices", "dominant position of market power" and "enterprises" have never been challenged, it is evident that they were agreed at a time when considerable differences existed among States participating in the negotiations, and it would seem possible at present to agree on simplified, more up-to-date definitions.

(ii) Scope of application

28. This section of the Set specifies that the Set applies to "all transactions in goods and services" (para. 5), is addressed to "all enterprises" (para. 6), "regardless of the parties involved in the transactions, acts or behaviour" (para. 7) and includes "any regional groupings of States, to the extent that they have competence in the area of restrictive business practices" (para. 8). The Set does not apply, however, "to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements" (para. 9). This provision has been interpreted to exclude voluntary export restraints and orderly marketing arrangements from the scope of the Set even though the similarity of such arrangements with market-sharing cartel agreements and/or price-fixing is blatant. The Agreement on Safeguards reached in the Uruguay Round provided in Article 11:2 that governments shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side, such as "export moderation", "export or import surveillance", "compulsory import cartels" and "discretionary export or import licensing schemes". Article 11:3 also provides that member States shall not encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures but does not outright prohibit such measures. It should be noted, however, that this provision does not apply to specific measures taken otherwise under other Uruguay Round Agreements, such as for textiles, agriculture and as services. It is likely that, to the extent quantitative measures are controlled by the Agreement, there will be a shift towards private restraints upon trade, particularly as there is no obligation upon governments to prevent such restraints.

All transactions in goods and services

29. The trend towards including services as well as goods under the scope of competition legislation has continued, in conformity with this section of the

Set. Sectors such as air transport and financial services, as well as liberal professions have been placed under the scope of competition law in many countries. This was amplified by the processes of deregulation and privatization which have practically generalized.

State-owned enterprises

30. In addition to the process of deregulation and "de-monopolization" taking place in many countries, including former centrally-planned economies, the general trend of privatization has reduced substantially the role of the State in most economies. In conformity with the Set, competition laws in an increasing number of countries cover State-owned enterprises (SOE) and control "natural" monopolies and utilities. However, "Acts of State" in general are not covered by competition legislation, but increasingly competition authorities are given an advocacy function to the government on matters related to competition.

Regional groupings of States

31. As described in part I of this note, while the European Union is at present the sole grouping of States having established competition rules of supranational level, other arrangements, including the Andean Group, ANZCERTA and NAFTA, have adopted general principles, and NAFTA engages member States to have domestic competition legislation and appropriate enforcement. Other regional arrangements, such as MERCOSUR and APEC are currently studying the matter.

Section C - Multilaterally agreed equitable principles for the control of RBPs

(i) General principles

32. The "general principles" enunciated in paragraphs 1-4 of Section C are still valid today.

(ii) Relevant factors

33. Paragraph 6 of Section C recognizes the possibility for national legislation to exclude certain sectors from the purview of the competition law. However, this provision of the Set should be read as a recommendation to States not to abuse the provision relating to exemptions. The general trend of deregulation and de-monopolization observed in the period under review augurs well in this respect. There do remain some sectors, however, such as agriculture and natural resources where notorious exceptions are still maintained, but these are increasingly being questioned.

(iii) Preferential or differential treatment for developing countries

34. Paragraph 7 of Section C provides that:

"In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the

development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and,

(b) Encouraging their economic development through regional or global arrangements among developing countries."

This provision of the Set appears to authorize infant-industry protection in developing countries, particularly least developed countries. With respect to small-sized firms, it should be noted that many competition laws, including in developed countries, provide for exemptions (e.g. block exemption of firms with a market-share of less than 5 per cent in the EU). Other countries authorize, in certain circumstances, all firms to combine their activities in order to increase their competitiveness with respect to larger enterprises or buying groups (e.g. the German Competition Act).

Section D - Principles and rules for enterprises, including transnational corporations

35. Paragraph 1 of Section D calls for enterprises to conform to competition laws and related provisions of the countries in which they operate, and to be subject to the competence of the courts in those countries. The available evidence suggests that this provision has never been questioned during the period under review. Problems can arise, however, where the country in which enterprises operate does not have competition legislation and enforcement mechanisms and, therefore, is not in a position to take remedial action.

36. Paragraphs 3 and 4 of Section D cover the main restrictive business practices that enterprises should refrain from. While provision D.3 deals with restrictive business practices between enterprises engaged on the market in rival or potentially rival activities, or so-called "horizontal practices", provision D.4 relates to practices by enterprises in an abuse, or acquisition and abuse, of a dominant position of market power, engaged in so-called vertical restraints.

Intra-firm transactions

37. In conformity with paragraph D.3 of the Set, it is now generally the case in domestic competition laws in both developed and developing countries that intra-firm transactions such as between parent firms and subsidiaries of transnational corporations, are not covered by this prohibition, as enterprises "dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other". It should be noted that practices between affiliated enterprises are covered under provision 4 of Section D, where they constitute an "abuse or acquisition and abuse of a dominant position of market power". In particular, predatory behaviour and transfer-pricing in transactions between afflicted enterprises are covered under subsections (a) and (b) of D.4.

38. Since the adoption of the Set, the general trend in competition legislation has been towards a considerable strengthening of control of horizontal practices when they affect the domestic market of countries having competition legislation. In revising their legislation, many countries have strengthened the bans relating to collusive tendering, which was made a "per se" offence in a number of countries, and heavily increased penalties with respect to price-fixing, market or customer allocation agreements, and horizontal practices in general. Numerous cases of collusive tendering and bid-rigging, in particular with respect to government procurement contracts have been challenged and heavily penalized.

39. The picture is less encouraging with respect to restrictive business practices affecting international trade, such as product allocation and price-fixing as to exports and imports. While all countries agree that price-fixing and market-allocation arrangements are basic contraventions of competition law, it has not been possible to date to agree to ban export cartels. International horizontal restraints might, however, be the first area where a consensus could be reached to outlaw such practices, as suggested in document TD/RBP/CONF.4/6 which describes selected cases of RBPs that have an effect in more than one country, in particular developing and other countries.

Enterprises in an abuse, or acquisition and abuse of a dominant position of market power

40. As defined in paragraph 2 of Section B of the Set, a "dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services". Under provision 4 of Section D, two interrelated concepts are involved, i.e. the abuse of an existing dominant position of market power and the acquisition and abuse of such power by use of certain restrictive business practices resulting in a firm or firms acquiring such a position of dominance over a specific market. Such practices include predatory pricing aimed at eliminating competitors (D-4 (a)); discriminatory pricing, including transfer-pricing, which involves "the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises" (D-4 (b)); mergers, take-overs, joint ventures or other acquisitions of control (D-4 (c)); resale price maintenance for exports (D-4 (d)); and restrictions on the parallel imports of goods "which have been legitimately marked abroad with a trade mark identical with or similar to the trade mark protected" in the importing country "and where the purpose of such restrictions is to maintain artificially high prices" (D-4 (e)). They also include refusals to deal, exclusive dealing, tied selling and other restrictions in the marketing and distribution of goods and services "when not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service (D-4 (f)).

41. Control of vertical restraints and of dominant positions of market power has received different attention by courts and legislators in various

countries since the adoption of the Set. Some vertical restraints, like resale price maintenance, are prohibited outright in some countries, even when not engaged in by dominant firms; in other countries, while the prohibition of resale price maintenance is maintained, certain exemptions can be found. Other vertical restraints, such as refusal to deal and especially tied selling (or purchasing) are viewed very differently from country to country.

42. Moreover, mergers and take-overs have increasingly been controlled under separate provisions and it would not seem feasible to keep this provision as part of practices in "abuse or acquisition and abuse of a dominant position of market power" as is currently the case in D-4 (f) of the Set.

Section E - Principles and rules for States at national, regional and subregional levels

Competition legislation and its enforcement

43. Provision 1 of section E calls for States at the national level or through regional groupings, to adopt, improve and effectively enforce RBP legislation. The importance of this provision of the Set was stressed by the Second Review Conference in operative paragraph 2 of the resolution it adopted in 1990, while it considered that one of the important means of strengthening the implementation of the Set is "the adoption and effective enforcement of national RBP legislation and that the increasing number of countries which have taken such action since the First Review Conference is an encouraging development" and called upon all States "to adopt, improve and effectively enforce appropriate legislation and to implement judicial and administrative procedures". The increasing number of countries that have adopted competition legislation since 1990, as described in the first part of this note, is a further encouragement in this respect. Further, some countries have, for the first time, requested their trading partners to implement more vigorously their competition legislation 10/ where it was alleged that weak implementation of such laws was detrimental to the interest of foreign firms striving to penetrate the local markets. Provision 3 calls for non-discrimination and due process in the application of competition laws and for competition legislation to be made publicly and readily available. UNCTAD has tried to help in this respect by publishing in its "Handbook of RBP legislation" as many new competition laws as possible, assisting in the dissemination and better understanding of existing competition legislation in developed as well as developing countries, and countries in transition. 11/

Exchange of information and cooperation among States

44. Under provision 4 of section C, States are requested to seek appropriate remedial or preventive measures against RBPs which are in their competence when it comes to their attention that such practices adversely affect international trade, and particularly the trade and development of the developing countries. Export cartels are a case in point here. So far, all countries have either exempted export cartels under their own competition legislation, or have ignored them as far as their adverse effects were not felt on the national territory of the country where the export cartel was established. Given the lack of agreement in this respect, and short of an

agreement to ban export cartels altogether, States where the effects of an export cartel are felt should take appropriate remedial action by applying their national competition legislation. Obviously, those countries that still have not adopted competition legislation, would have to do so in order to have the means to defend themselves. Having competition legislation also gives them the possibility to request information and to consult with the competition authorities of the State where the restrictive business practices originate from. Provision 4 might prove useful in this respect for remedial action to be taken by the competition authorities of both States.

45. Subject to specific safeguards with respect to confidential information (provision E-5), States are requested to institute procedures for obtaining information necessary for their effective control of RBPs (provision E-6); to establish appropriate mechanisms at the regional and subregional levels to promote exchange of information, and to assist each other in the control of RBPs (provision E-7). Furthermore, States with greater expertise in this field are requested to share their experience with other States upon request (provision E-8) and supply other States particularly developing countries with publicly available information or other information necessary for the effective control of RBPs (provision E-9) to the extent consistent with their laws and established public policy. In order to encourage States to exchange information, the Second Review Conference requested the UNCTAD secretariat to issue a directory of restrictive business practices authorities and to update it regularly. 12/ It further requested the Secretary-General of UNCTAD to prepare an indicative checklist of items which may be useful for countries wishing to request information from other States. This together with guidelines for consultations mentioned below is contained in the latest version of the directory. 12/

Section F - International measures

Common approaches to competition legislation and the model law

46. The objective of provision F.1 is to achieve "common approaches" in national competition policies compatible with the Set. The growing number of countries adopting competition regimes are an indication of the fact that there is a convergence of views in this field. It should be noted, however, that national competition legislation should be "tailor-made" for individual countries, taking into account their national juridical systems, their level of development, specific choices, etc. and that numerous "models" exist, even within the developed countries. Therefore, while certain converging trends are discernible, such as condemnation of "hard core" price-fixing and collusive tendering, the time is not ripe for a single model of legislation. Rather, as was proposed in the UNCTAD secretariat's "Model law or laws", a basic skeleton of competition legislation is suggested in the possible elements for articles, and the ways in which these elements are implemented by different countries in their national competition laws are described in the commentary to the Model Law. 13/ The Model Law has provided a useful basis for countries willing to draft competition legislation. As called for in the Set (provision F.5), there is need for continued work on the elaboration of the Model Law, in particular in updating and improving the commentary contained therein, taking into account most recent changes in legislation.

Information and consultations

47. Provision F.2 requests States and regional groupings to communicate annually to the Secretary-General of UNCTAD for appropriate information on steps taken to meet their commitment to the Set, and information on the adoption, development and application of legislation, regulations and policies concerning RBPs. Based on such information and other sources of public information such as press releases, the UNCTAD secretariat is requested in provision 3 to continue to publish annually a report on developments in the field of competition. While this has been done in particular through studies and reports, including periodic information notes, resource limitations and the exponentially increasing amount of information available have seriously confined the secretariat's ability to publish full-fledged annual reports as in the past. The proposal to create a computerized bibliography and database would represent considerable progress in this respect. 14/

Consultations and technical assistance

48. Provision F (4), which provides for consultation procedures, does not seem to have been used extensively since the adoption of the Set. In order to facilitate States' requests for information and consultations, the Second Review Conference had requested the UNCTAD secretariat to prepare detailed checklists for requests of information and consultations. 15/ As indicated in that document, the checklists for information and for consultations should be a practical vehicle for States wishing to approach other States concerning issues in the area of RBPs. In this respect, it is recalled that in line with provision F.4 (a) of the Set, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for consultations.

49. With respect to technical assistance (provisions 6 and 7 of section F), the secretariat has made its best efforts to respond to rapidly increasing requests with the limited resources available. At the time of writing, more and more demands of differing nature are made to the secretariat in this field. The main types of requests so far are as follows:

(i) States without any competition legislation may request information about restrictive business practices, their existence and possible adverse effects on their economy. This might involve a study of the restrictive business practices in their economy;

(ii) States without legislation in this field may request introductory seminars directed at an audience which would include government officials and academics, as well as business and consumer-oriented circles;

(iii) States which are in the process of drafting competition legislation may request information on such legislation in other countries, and seek advice as to drafting their competition legislation;

(iv) States which have just adopted competition legislation may seek appropriate advice for the setting-up of the competition authority; this usually includes training of officials responsible for the

actual control of RBPs; and may involve training workshops and/or on-the-job training with competition authorities in countries having experience in the field of competition;

(v) States which have already adopted such legislation and have experience in the control of RBPs may wish to consult each other on specific cases and exchange information; seminars may be organized for such exchanges between competition authorities;

(vi) States which wish to revise their competition legislation might seek expert advice from competition authorities in other States, so as to amend their laws in the most effective manner possible.

50. Types of technical cooperation include both bilateral and multilateral action, the latter involving the UNCTAD secretariat. Seminars or workshops may be directed at a single country at a time, or be of a regional or subregional nature. Some of the main technical assistance activities organized by UNCTAD in the area of competition are listed in the annex to this note.

51. A number of countries, such as Germany, Sweden and the United Kingdom, have accepted UNCTAD requests to train foreign competition officials at the premises of their competition authorities. Such exchanges of personnel, although time-consuming and difficult to organize, sometimes for language or confidentiality reasons, might be one of the most effective ways of on-the-job training for officials of recently established competition authorities.

52. It should also be noted, as was agreed at the Second Review Conference, that bilateral technical assistance is, together with multilateral assistance, an important way to secure implementation of the Set. However, because information on bilateral cooperation available to the secretariat is incomplete, and it was found preferable not to try to provide specific details here. In the discussion under this item, governments may wish to inform the Third Review Conference of their bilateral efforts in this field.

Growing needs for technical assistance and insufficient resources

53. Although the Set calls for adequate resources to be provided for technical assistance activities (provision 7 of section F), and resources made available from different sources have expanded, as witnessed by the increased activities of UNCTAD year after year, it is none the less true, as indicated in the annex, that resources, both from international financing organizations such as UNDP and voluntary contributions from donor countries, have proved insufficient to meet all the demands for assistance. Contributions, in terms of provision of experts from countries more experienced in the field of competition policy have been more forthcoming.

III. CONCLUSIONS AND PROPOSALS FOR ACTION

54. The strong pressures for market-oriented reforms, including deregulation, privatization and trade and FDI liberalization, have led to an emerging consensus, not only in developed but also in developing countries as well as in economies in transition, as to the importance of the role of competition

policy in increasing the effective allocation of resources within the economy. In consequence, in the second part of the 1980s and especially the first half of the 1990s, a rapidly growing number of countries have adopted competition legislation and established national enforcement agencies as an effective tool of competition policy, broadly in line with the provisions of the Set.

55. Most national competition laws, however, do not deal with competition outside national boundaries, and do not control restrictive business practices which affect foreign markets, such as export and international cartels. Without full cooperation from the authorities of the country where such practices originate, it might sometimes be difficult or even impossible to take effective remedial action against restrictive business practices whose adverse effects are felt in one country, but which originate in another. It is also likely that, as a result of liberalization, private restraints to trade will tend to replace government border barriers. There might also be conflicts between countries of interpretation of national competition rules or about their enforcement, especially in cases where such rules have extraterritorial application. Such conflict of interpretation might arise, for example, when, as a result of foreign direct investment in one country, a dominant firm or a monopoly situation is created in that specific market. Hence, in an increasingly globalized world economy, national competition policies need to be complemented by action at the international level to protect and promote the vitality of competition in the global market. In the same way as competition in domestic markets, global competition would promote global economic efficiency and consumer welfare, improve terms of trade and provide a "level playing field" for access to international markets, particularly for the weaker members of the international community such as developing countries.

56. Such considerations have led to calls for competition policy to be placed on the international trade agenda. 16/ Progress in this direction could reduce existing inconsistencies between international trade and competition regimes, thus affording developing and other countries greater security against anti-competitive behaviour and its adverse effects on their domestic markets, while at the same time improving access to overseas markets for their exports, free from trade-distorting restrictive business practices.

57. Two broad complementary approaches exist for bridging the gap between competition and trade policies: one would be for competition authorities worldwide to take mutually reinforcing cooperation measures to ensure that the beneficial effects of the liberalization of governmental border restraints on trade are not nullified by private restraints; the other would include measures to encourage trade regimes to draw upon competition principles to advance further the process of trade liberalization. Such international action could build upon the common ground of competition principles established in national competition regimes, in the Set of Multilaterally Agreed Equitable Principles and Rules on RBPs and in the Uruguay Round Agreements.

58. In view of its experience with the Set, its broad mandate in the field of development and its universal membership, UNCTAD can make an important contribution to this process. This was recognized by the Trade and Development Board which agreed that UNCTAD should contribute towards policy

analysis and global consensus-building on competition policy. 17/ This request by the Board should be seen in the context of the intergovernmental agreement in the Board (agreed conclusions 419 (XL), para. 9) that "UNCTAD should also continue background work and consensus-building on trade and economic policy issues before they became the subject of negotiations in the WTO". By so deciding, the Board has defined a broad framework for complementary functions between UNCTAD and WTO, recognizing that there should be a constructive and effective cooperation between the two institutions. In this connection, UNCTAD's role in the area of competition policy could be further elaborated upon at the Third Review Conference.

59. It may be recalled that, in conformity with UNCTAD's broad mandate in the area of trade and development, its specific functions in the competition field are inter alia:

(a) To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;

(b) To undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;

(c) To study matters relating to the Set of Principles and Rules and which might be characterized by data covering business transactions and other relevant information obtained upon request addressed to all States;

(d) To collect and disseminate information on matters relating to the Set of Principles and Rules, to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;

(e) To make appropriate reports and recommendations to States on matters within their competence, including the application and implementation of the Set of Principles and Rules (see art. G.3 of the Set).

60. UNCTAD is also mandated to continue work on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation, and to implement or facilitate technical assistance, advisory and training programmes on restrictive business practices, particularly for developing countries, through various methods (see arts. F.5 and F.6 of the Set).

61. From the meetings of the Intergovernmental Group of Experts on Restrictive Business Practices, and in particular the fourteenth session (March 1995), which acted as preparatory meeting for the Third Review Conference, there seems to be a wide convergence of views that core competition issues should continue to be dealt with in UNCTAD. As the proposals put forward by the Intergovernmental Group of Experts at its

fourteenth session for consideration by the Third Review Conference suggest, 18/ there is a need in particular for a broad range of conceptual studies aimed at identifying "common ground" in the approaches followed on different competition questions by Governments, and at shedding light and encouraging exchanges of views in those areas where the identification of common ground is more difficult. The latter include research on the role of competition policy in the strengthening of the economies of developing countries; the interface between competition, technological innovation and efficiency; the treatment of vertical restraints and abuses of dominant positions; the competition policy treatment of the exercise of intellectual property rights and of licences of IPRs and know-how. The actual extent of the common ground might be expected to increase over time, particularly as a result of technical cooperation activities at the bilateral, regional and multilateral levels, and of increased consultations between national competition authorities.

62. With the growing convergence of views on competition policies, the international community might consider undertaking efforts to introduce broadly defined competition rules into the existing international trading system. For example, the Uruguay Round Agreements might be further developed in order to bring them more into line with basic competition principles. 19/ In this endeavour, UNCTAD's experience with the Set could be drawn upon to formulate a core of universal competition principles that would form the basis for the work to be done on the international trading system. Such principles could be based on experiences with existing provisions of the Set. They could, for example, concern the need for States to enact and effectively enforce national competition legislation (provision E.1 of the Set); the necessity to apply such laws in a non-discriminatory manner (provision E.3); to what extent exemptions from such legislation would be appropriate (provision C.6); to what extent States should prevent the use of RBPs within their competence when such practices affect international trade, particularly the trade and development of developing countries (provision E.4); the extent to which competition authorities should cooperate with each other in resolution of cases (provisions 7, 8 and 9 of section E); elimination of hard core horizontal RBPs, and collusive tendering affecting international trade (provision D.3); to what extent States should ban national legislation having anti-competitive effects; the extent to which preferential or differential treatment for developing and least developed countries would apply to competition issues (provision C.7), etc.

63. The above rules concern actions by Governments. It would indeed seem premature to attempt to elaborate international competition rules for enterprises to be enforced by a supranational body. Countries would continue to exercise their sovereignty over their domestic markets, and elaborate their own "tailor-made" national competition legislation and enforce it effectively. Cooperation among competition authorities would be strengthened through sets of bilateral, regional and possibly plurilateral agreements. The international trading system would function in conformity with the agreed universal principles of competition and with any specific contractual commitments that might be negotiated in future, with the WTO dispute settlement mechanisms called upon to ensure that countries effectively apply these principles and rules.

64. As domestic laws evolve over time and achieve a greater level of convergence and harmonization, the adoption of binding multilateral rules for enterprises could be considered. Depending on the level of convergence reached, a first attempt in this direction might be for the international community to elaborate rules prohibiting in principle hard core price-fixing and collusive tendering by export and international cartels, over which a consensus seems to be emerging. For other concepts, such as vertical restraints in abuse of dominant positions of market power, improved voluntary guidelines along the lines of the Set might remain more appropriate for the time being.

65. The issue of the interrelationship between trade and competition policy has been placed on the provisional agenda of UNCTAD IX. On the basis of the progress achieved by the Third Review Conference, UNCTAD IX could pave the way for initiating a consensus for action to be taken by the international community on a step-by-step approach, as envisaged above.

66. Action at the multilateral level needs to be complemented by action at the national level, to enable all countries to experience the benefits which can be obtained from the adoption and implementation of competition laws and policies. In this connection, given the difficulties relating to resources for technical cooperation mentioned above, there is a need to enhance cost-effectiveness, complementarity and collaboration among providers of technical cooperation, both in terms of the geographical focus of technical cooperation activities and the nature of cooperation undertaken; and to mobilize adequate resources and widen the search for potential donors for UNCTAD technical cooperation in this area. 20/

Notes

1/ Including Argentina, Brazil, Chile, Colombia, Costa Rica, Côte d'Ivoire, the Dominican Republic, El Salvador, Fiji, Gabon, Ghana, Guatemala, Kenya, India, Jamaica, Mexico, Pakistan, Peru, Philippines, Republic of Korea, Sri Lanka, Thailand, Tunisia, Trinidad and Tobago, Venezuela and Zambia.

2/ Including Bulgaria, the Czech Republic, Hungary, Lithuania, Poland, Slovakia and the Russian Federation.

3/ Such as Argentina, Chile, Sri Lanka and South Africa.

4/ Decision 285 of the Commission of the Cartagena Agreement.

5/ OECD/GD (93) 101, para. 23.

6/ Marrakesh Ministerial Meeting on the adoption of the Uruguay Round Agreements (April 1994). At that Meeting, Ministers representing a number of delegations stressed the importance they attached to their requests for an examination of the "relationships between the trading system and internationally recognized labour standards; between immigration policies

and international trade; trade and competition policy, including rules on export financing and restrictive business practices; trade and investment; regionalism; the interaction between trade policies and policies relating to financial and monetary matters, including debt, and commodity markets; international trade and company laws; the establishment of a mechanism to compensate for the erosion of preferences; the link between trade, development, political stability and the alleviations of poverty; and unilateral or extraterritorial trade measures" (as contained in the concluding remarks of the Chairman of the Trade Negotiating Committee).

7/ Ibid., para. 7.

8/ See footnotes 1, 2 and 3.

9/ In countries such as the United States the same body deals with both laws. In some countries, the same body covers not only competition law and consumer protection laws, but also corporate law and intellectual property rules.

10/ See United States-Japan SII Trade Talks.

11/ To date, the competition laws and appropriate commentaries of Belgium, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, Jamaica, Kenya, Lithuania, Mexico, Norway, Pakistan, Poland, Portugal, Republic of Korea, Slovak Republic, Spain, Sri Lanka, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Zambia have been published in the various issues of the Handbook.

12/ The latest directory was made available in document TD/B/RBP/78/Rev.3.

13/ The latest revision of the Model Law is contained in document TD/B/RBP/81/Rev.4 which is made available to the Third Review Conference.

14/ See in-depth feasibility study of developing a bibliography and appropriate database facility (TD/B/CONF.4/7) which is made available to the Third Review Conference.

15/ These are contained as annex to the Directory of RBP Control Authorities (TD/B/RBP/76/Rev.3).

16/ See, for example, the speech by Sir Leon Brittan, delivered in Brussels on 22 June 1994 and the Economic Report of the President of the United States, 1994, p. 40.

17/ Para. 11 (d) of Trade and Development Board agreed conclusions 410 (XL) of April 1994.

18/ Part II of agreed conclusions, Annex II of the report of the fourteenth session of the Intergovernmental Group of Experts on Restrictive Business Practices, op. cit.

19/ See "scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy including their implications for developing and other countries" (TD/RBP/CONF.4/8).

20/ See the agreed conclusions of the Intergovernmental Group of Experts, para. II (a), (iv) and (v), in TD/B/42(1)3-TD/B/RBP/106.

ANNEX

Main technical assistance activities of UNCTAD in the area of competition (1986-1995)

Year	Type of activity	Country(ies) of participants	Foreign experts from:	Location
1986	Regional seminar for Africa	Botswana Egypt Ethiopia Gambia Ghana Kenya Lesotho Liberia Somalia Swaziland United Republic of Tanzania Zambia Zimbabwe	Federal Republic of Germany Norway Sweden	Nairobi (Kenya)
1987	Regional seminar for Asia	Bangladesh Brunei Darussalam Burma (now Myanmar) China Democratic People's Republic of Korea Fiji India Islamic Republic of Iran Nepal Papua New Guinea Philippines Republic of Korea Sri Lanka Thailand Viet Nam	Federal Republic of Germany Japan Norway Sweden	Bangkok (Thailand)

Year	Type of activity	Country(ies) of participants	Foreign experts from:	Location
1989	Regional seminar for Africa	* List of 33 invited countries Angola Benin Burkina Faso Burundi Cameroon Cape Verde Central African Republic Chad Comoros Congo Côte d'Ivoire Djibouti Equatorial Guinea Guinea Madagascar Mali Morocco Mozambique Niger Rwanda Sao Tome and Principe Senegal Togo Tunisia Zaire	France Spain EEC	Douala (Cameroon)
1990 September	Regional seminar for Latin America	Bolivia Brazil Chile Cuba Ecuador El Salvador Guatemala Honduras Mexico Nicaragua Paraguay Peru Trinidad and Tobago Uruguay Venezuela	Federal Republic of Germany Norway Sweden United States of America	Caracas (Venezuela)
	National seminar	Cuba	Sweden	Havana (Cuba)
1991 February	National seminar	Ghana	Germany	Accra (Ghana)
March	National seminar	Zambia	Netherlands	Lusaka (Zambia)

Year	Type of activity	Country(ies) of participants	Foreign experts from:	Location
1991 (cont'd.) June	National seminar	Indonesia	Netherlands Sweden	Djakarta (Indonesia)
September	Subregional symposium on competition	Bangladesh China Fiji Islamic Republic of Iran Myanmar Philippines Republic of Korea Sri Lanka Viet Nam	United States of America Philippines	Seoul (Republic of Korea)
	Subregional seminar/exchange of experience	India Sri Lanka Thailand	Germany	Bangkok (Thailand)
November	Subregional workshop for ASEAN countries	Brunei Darussalam Indonesia Philippines Thailand	Netherlands Norway	Manila (Philippines)
1992 March	Advisory mission	Colombia		Bogotá
	Advisory mission	Trinidad and Tobago		Bogotá
	Advisory services on drafting of legislation	Ghana	Germany United Kingdom	Accra
September	National seminar	China	France Norway United Kingdom	Beijing
	National seminar	Viet Nam	France EEC	Hanoi
October	National seminar	Argentina	Germany	Buenos Aires
1993 February	National seminar (exchange of experience)	India	Germany	New Delhi (India)
March	Subregional seminar	El Salvador Guatemala Honduras	Norway Sweden	Guatemala City
	Subregional seminar	Costa Rica Nicaragua Panama	Norway Sweden	Panama City

Year	Type of activity	Country(ies) of participants	Foreign experts from:	Location
1993 March (cont'd.)	Regional seminar for CARICOM	Antigua and Barbuda Bahamas Barbados Dominica Grenada Guyana Jamaica Montserrat	Canada Norway Sweden	Bridgetown (Barbados)
June	National seminar	Egypt	Germany	Cairo (Egypt)
1994 January	National seminar	Malaysia	Australia Norway Pakistan	Kuala Lumpur (Malaysia)
February	Regional seminar for FORUM countries	Cook Islands Fiji Kiribati Papua New Guinea Solomon Islands Tonga Samoa	Australia Norway New Zealand	Suva (Fiji)
March	National seminar	China	Germany United Kingdom	Shanghai Shenzhen (China)
June	World Bank/UNCTAD Conference on Competition Policy and International Trade	Chile Colombia Peru Venezuela Mexico	United States of America EU	Bogotá (Colombia)
August	Subregional seminar	Bahamas Belize Jamaica	Norway	Kingston (Jamaica)
November	National seminar	Trinidad and Tobago	Jamaica Norway	Port of Spain (Trinidad and Tobago)
	National seminar	Philippines	Germany	Manila (Philippines)
	National seminar	Nicaragua	Norway	Managua (Nicaragua)
December	National seminar	El Salvador	Norway	San Salvador
	National seminar	Peru	Germany	Lima (Peru)
1995 February	National seminar	Guatemala		Guatemala City
	Advisory mission	El Salvador		San Salvador